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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 104

JEFFERSON CITY CABINET CO.,

Petitioner,

vs.

LOCAL UNION 748 OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

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JEFFERSON CITY CABINET CO.,

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LOCAL UNION 748 OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Jefferson City Cabinet Co. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 23, 1963.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at ___ F. 2d ___, and is printed in the Appendix hereto, at p. 9. The District Court's order granting motion to dissolve and arbitration, filed April 3, 1962, which is unreported, is printed in the Record, p. 68a.* The opinion of the United States Court of Appeals for the Sixth Circuit in Case No. 14,839, a companion case, is reported at ___ Fed., 2d ___, and is printed in the Appendix hereto, p. 17.

* Appellant's Appendix below, of which nine extra copies are filed herewith.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 23, 1963. Rehearing was denied on March 19, 1963.

Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred upon this Court by the provisions of 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Is the employer required to arbitrate the discharge of striking employees under the grievance-arbitration provisions of a collective-bargaining agreement, where no grievance was presented within the time required by the agreement?

2. Where a collective-bargaining agreement contains a grievance-arbitration procedure expressly requiring that all grievances be handled under that procedure without suspension or interruption of work, and the union nevertheless calls and conducts a strike on account of a grievance, is the employer still required to use this same grievance-arbitration procedure to arbitrate the discharge of striking employees?

STATUTE INVOLVED.

This case involves Section 301(a) of Labor Management Relations Act, 1947, 29 U. S. C. Sec. 185(a), which reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE.

The respondent brought an action to require the petitioner to arbitrate certain grievances in accordance with the provisions of a collective-bargaining contract. The jurisdiction of the District Court was invoked under Section 301(a) of Labor Management Relations Act, 1947.

The petitioner (employer) and the local union were parties to a contract in effect from September 12, 1958, to May 1, 1961. The contract contained a grievance procedure ending in arbitration. It specifically provided that, if grievances should arise, there should be no suspension or interruption of work on account of such grievances, and that all grievances should be handled under the procedure set forth in the agreement. This pledge was amplified in a further clause under which the union agreed that there should be no strikes and the company agreed that there should be no lockouts during the life of the contract.

In spite of these provisions, the respondent called a strike, which began on February 7, 1961, and continued beyond the term of the contract expiring on May 1, 1961. The dispute arose when an employee returned from sick leave and demanded to be put to work on the same day. The employer told her that there was no work available for her that day, but to return the next day, at which time work would be available for her. Because she was not put to work immediately, the union called a strike without resort to the grievance procedure provided in the contract, and in violation of its no-strike obligations. On February 13, 1961, the employer notified approximately 201 of the strikers of their discharge for participation in the strike. On March 21, 1961, the employer notified some 632 other employees still on strike of their discharge for continued participation in the strike.

Under the contract it was required that any grievance be submitted orally to the first step of the prescribed procedure within three working days of the occurrence giving rise to the complaint, and that the grievance be presented in writing at the second step within two days after the oral discussion in Step 1. No complaint or grievance was filed on any of these discharges until April 24, 1961. A written grievance was presented by the local union on that date. On April 27, 1961, the union requested arbitration of the discharges, and the petitioner declined to arbitrate, taking the position that there had been no timely or proper submission of the complaint to the grievance procedure, and that the union was flagrantly disregarding its own obligations under the contract and was therefore not in a position to demand arbitration. The contract expired on May 1, 1961.

The District Court directed the petitioner to arbitrate the discharges under the procedure provided in the contract. The Court of Appeals affirmed the judgment.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below and the decision of the Court of Appeals for the Second Circuit in *Livingston v. John Wiley & Sons, Inc.*, ___ F. 2d ___ (decided Jan. 11, 1963), which was expressly followed by the Court below, are directly in conflict with the decision of the Court of Appeals for the First Circuit in *Boston Mutual Life Insurance Co. v. Insurance Agents International Union*, 258 F. 2d 516, and with the decision of the Court of Appeals for the Seventh Circuit in *Brass & Copper Workers v. American Brass Co.*, 272 F. 2d 849. The Court below recognized that there was a conflict in the decisions of the Courts of Appeals (Appendix, *infra*, p. 14).

The Court below held that the employer was bound to arbitrate the discharges despite the union's failure to present a grievance within the time required by the contract. The Court followed the holding of the Second Circuit in the *Livingston* case and decided that such questions of procedural arbitrability must be presented to the arbitrator rather than to the court. The First and Seventh Circuits reached the opposite conclusion in the two cases cited above.

2. This case presents important questions concerning the union's repudiation of arbitration and the effect of such repudiation upon the employer's obligation to arbitrate. These questions have not previously been decided by this Court. In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers International*, 370 U. S. 254, 8 L. Ed. 2d 474, this Court suggested the probable effect of a party's repudiation of the arbitration provisions of a contract. The following passage from the opinion is significant:

> "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract * * *; and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important."

In *Drake* there was no issue of repudiation of the arbitration provisions. But questions of the fact and effect of such repudiation are squarely presented in this case. The Court is now requested to decide these questions which were not reached in *Drake*.

The questions here differ from those in *Drake* because of substantial differences in the respective contracts. *Drake* presented questions concerning the relationship of no-strike and arbitration clauses resulting only from their

presence in the same collective agreement. In the present case the parties incorporated a no-strike clause in the grievance procedure, entirely apart from the general no-strike, no-lockout clause appearing subsequently in the contract. This contractual framework manifests an intent to combine the no-strike requirement and the grievance-arbitration procedure as mutually dependent parts of a single machinery for amicable settlement of disputes. The question of repudiation arises in the context of these contract provisions.

The importance of this case lies primarily in the public interest in the peaceful settlement of labor disputes. The grievance-arbitration clause has become a regular part of the collective-bargaining agreement. These clauses differ in their specific terms, but in one form or another such clauses have become an almost universal part of the labor contract. The public interest lies more in the availability of an effective means for amicable settlement of disputes than in the particular decision reached in any individual controversy.

The parties here provided such a procedure; its requirements were twofold: (1) that there should be no suspension of work over grievances, and (2) that all grievances should be handled under the prescribed procedure ending in arbitration. Since the strike necessarily rendered the first requirement impossible of achievement, the contract procedure could not then work in the manner contemplated by the parties. The decision of the courts below, directing arbitration after the grievance procedure has already been disrupted by a strike, tends to discourage rather than encourage the use of such voluntary procedures, including arbitration, for the amicable settlement of labor disputes.

3. The decision of the Court of Appeals is inconsistent in principle with the decision of this Court in *Drake, supra*. In its opinion in the companion case (No. 14,839) the Court below stated the reasoning which it deemed to be controlling in both cases. It interpreted and applied *Drake* as requiring a holding that the no-strike clause and grievance provisions are not mutually dependent covenants, and each the *quid pro quo* for the other, even where the parties have incorporated a no-strike clause in the grievance provisions themselves and have made the no-strike requirement an essential part of the procedure for amicable settlement of disputes. On this subject the substance of the *Drake* ruling is that these clauses are not automatically to be regarded as "exact counterweights," but are rather to be viewed in their context in the collective agreement.[1] By failing to consider the no-strike provisions in their context in the collective agreement, the Court below has misinterpreted and misapplied the holding in the *Drake* case, and has departed from its underlying principle.

This question has an importance extending beyond the interests of the parties. The public has a substantial interest in the enforcement of agreements for the peaceful settlement of disputes. These agreements can be enforced only according to their terms. This Court has not yet decided the effect of a no-strike clause which by contract is made a part of the grievance-arbitration procedure. These contract provisions are not unusual, and it might be expected that similar no-strike clauses incorporated in the grievance-arbitration provisions appear in large numbers of collective agreements over the country.

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[1] *Drake Bakeries v. Local 50, etc., supra*, 8 L. Ed. 2d 474, 479, footnote 7.

CONCLUSION.

For the foregoing reasons it is submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 15001

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOCAL 748 OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Plaintiff-Appellee,

v.

JEFFERSON CITY CABINET COMPANY,

Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided February 23, 1963.

Before: MILLER and WEICK, Circuit Judges, and THORNTON, District Judge.

MILLER, Circuit Judge. The plaintiff Union brought this action in the District Court under Section 301 of the Labor Management Relations Act of 1947, Section 185, Title 29, United States Code, to require the defendant employer to arbitrate certain grievances in accordance with the provision of the collective bargaining agreement between the parties. The District Judge entered an order granting plaintiff's motion for summary judgment directing arbitration, from which this appeal was taken.

This is a companion case to appeal No. 14,839 in this Court, involving the same parties, the same collective bargaining agreement, and arising out of the same general controversy, in which the opinion of this Court was

handed down on February 4, 1963. *Jefferson City Cabinet Co. v. International Union, etc.*, . . . F. (2) . . ., C. A. 6th. That action arose out of the fact that an employee, Clara Cameron, who had been absent on authorized sick leave, returned to work on February 7, 1961, and demanded that she be put to work that day. The employer told her there was no work available for her that day, but to return the next day, at which time work would be available for her. Upon refusal to give her employment that day, the Union called the strike the same day, without resort to the grievance procedure provided by the bargaining agreement and in violation of its no-strike obligation. The employer, Jefferson City Cabinet Co., brought an action in the District Court for damages resulting from the strike in violation of the Union's no-strike obligation in the bargaining agreement. The Union contended that the strike was a grievance or dispute between the parties which was subject to arbitration under the arbitration provisions of the bargaining agreement and that the matter could not be litigated in the court action. This Court, relying mainly upon *Drake Bakeries, Inc. v. Local 50, etc.*, 370 U. S. 254, affirmed the judgment of the District Court sustaining the Union's contention. Reference is made to the opinion in that case for a statement of the applicable provisions of the bargaining agreement, the arbitration provisions involved, and the reasons given for the ruling, together with citation of authorities in support thereof.

The strike occurred on February 7, 1961. On February 13, 1961, the employer notified approximately 201 of the strikers of their discharge for their participation in the strike. After obtaining a temporary injunction in the state court, the employer urged the remaining strikers to return to their jobs. Approximately 415 employees returned to work. Approximately 632 employees did not re-

turn to work. By letter dated March 21, 1961, the employer informed the latter group that they were discharged because of their continued participation in the strike, in violation of the contract.

No complaint or grievance was made or filed on any of these discharges until April 24, 1961. On that date the Union presented a "grievance report" protesting the discharge of the strikers and requesting that they be reinstated to their jobs. The employer took the position by letter of April 26 that neither the Union nor the former employees had made a proper and timely submission of the alleged complaint to the contract grievance procedure, that the Union was engaging in a prolonged and continuing disregard of its obligations under its contract, and that the employer was not willing to discuss these "grievances" while this illegal activity was continuing. The Union on April 27, 1961, advised the employer of its wish to arbitrate the grievances, and by letter of April 29, 1961, the employer restated its position as previously expressed. This action was filed on August 12, 1961, asking the Court to adjudicate that the employer had breached the bargaining agreement and to direct the employer to proceed with arbitration. As of March 3, 1962, the date of an affidavit filed in opposition to plaintiff's motion for summary judgment, the employer had not received any notice from the Union that the strike was terminated.

No real contention is made that the discharge of the employees would not under ordinary conditions have been an arbitrable grievance under the bargaining agreement. The employer contends, however, that the requirement of no suspension of work on the part of the Union was a condition to the right of the Union to use the grievance arbitration procedure, that the refusal of the Union to refer the Clara Cameron grievance to the contract pro-

cedure but to strike instead in violation of the provisions of the bargaining agreement, was a substantial breach going to the essence of the contract and amounted to a repudiation of the contract, which relieved the employer of any further obligation to perform it, and that Union, while continuing its prolonged breach of contract in maintaining the strike, cannot at the same time invoke the same contract to require the employer to arbitrate the discharges.

It may be well, however, to note here that the employer's claim of repudiation of the contract by the Union and its acceptance of such repudiation may not have the factual support claimed by the employer. The employer, even during the period of the strike, continued to deduct Union dues from the wages of Union members who were working and to transmit them to the Union, as required by the contract's terms. Also, during the strike, the employer processed and adjusted pending grievances under the grievance procedure of the contract. We do not find that the employer at any time prior to the filing of this action contended that the entire contract had been abrogated.

Regardless of the merits of these contentions as a matter of law, under ordinary principles of contract law, we believe, as pointed out in our opinion in the companion case, the Supreme Court has rejected this treatment of the issue in its decisions in *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 567; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578-579, 582, and *Drake Bakeries v. Local 50, etc.*, supra, 370 U. S. 254, 261-263, Note 10 at page 263. In the *Warrior & Gulf Navigation Co.* case the collective bargaining agreement is referred to as calling into being "a new common law" and "the common law of the shop," and as being more than a contract, in that it is "a generalized

code to govern a myriad of cases which the draftsman cannot wholly anticipate." Those cases from the Supreme Court and our own opinion in the companion case to the present one, which relied upon them, are, we think, decisive of the present case and sustain the Union's demand of arbitration, unless it is barred by the following additional contention of the employer.

The employer contends that the Union cannot require arbitration because it failed to comply with the procedural requirements of the grievance procedure, in that some of the employees were discharged on February 13, 1961, and others on March 21, 1961, but no complaint or grievance was made or filed on any of these discharges until April 24, 1961. Under Step 1 of the grievance procedure the grievance shall be discussed by the affected employee with the foreman within three consecutive working days of the occurrence of the alleged violation, and if not disposed of through discussion, will be reduced to writing. Steps 2, 3 and 4 contain other short time limitations, none of which were complied with in this case, before the unsettled dispute could be appealed to the Arbitration Procedure. The bargaining agreement provided that the above time limits were to be strictly adhered to unless the Company and the Union mutually agreed in writing to extensions, and if the Union failed to appeal a grievance to the next step within the time provided, it would be regarded as settled.

It may be that the Union is barred from enforcing arbitration by reason of its default in this matter. It claims, however, that it is not barred because it was not the intention of the parties that such procedure would apply to discharged employees on strike to whom, by reason of being barred from the plant, such procedure was not as a practical matter available, and because such procedure would have been a vain and useless act in view of

the employer's expressed views in the matter. There is authority in support of this second contention. *Southwestern Electric Power Co. v. Local Union No. 738, etc.*, 293 F. (2) 929, 932, C. A. 5th; *International Association of Machinists, etc. v. Hayes Corporation*, 296 F. (2) 238, 244, C. A. 5th. The Union also contends that the strike and the discharges were a continuing violation of the bargaining agreement, which, under Step 1 of the grievance procedure, made the three-day limitation there imposed inapplicable.

This question will have to be decided at some time in this litigation. But before the question is decided on its merits, we have before us the present question of whether the Court or the arbitrator is to make the decision. There appears to be a sharp split in the authorities on this question, with no decision from the Supreme Court directly in point.

The conflicting authorities, both in the District Courts and the Courts of Appeals, are referred to in a recent opinion of the Court of Appeals for the Second Circuit, *In the Matter of David Livingston, etc. v. John Wiley & Sons, Inc.*, . . . F. (2) . . ., decided January 11, 1963, and need not be recited here. To those citations there can be added a recent decision from the Court of Appeals for the Fifth Circuit in *Deaton Truck Line v. Local 612, etc.*, . . . F. (2) . . ., decided November 16, 1962. See also: *Maryland Telephone Union v. Chesapeake & Potomac Tel. Co.*, 187 F. Supp. 101, 109 D. C. Md. It was held in both the *David Livingston* case and in the *Deaton Truck Line* case that the question of whether there has been sufficient compliance with preliminary steps in grievance procedure is a matter for decision by the arbitrator, not the Court. It is stated in the opinion in the *David Livingston* case that the more recent decisions hold that the question is for the

arbitrator, and that the commentators in general agree that the matter is for the arbitrator. That opinion also expresses the view that a holding that the court should decide the merits of a dispute concerning questions under an arbitration clause of a collective bargaining agreement would be quite inconsistent with the principles and policies enunciated by the Supreme Court in the recent United Steelworkers cases in Vol. 363, United States Reports, to the effect that once it has been determined that the reluctant party has breached his promise to arbitrate, the matter must go to arbitration for determination on the merits, and would rob the parties of the advantages they had bargained for, namely, the determination of the issues between them by an arbitrator and not by a court. The opinion also points out that it is the essence of arbitration that it be speedy, that the sources of friction between the parties be promptly eliminated, and that if procedural questions are to be passed on by the court it would open the door to all sorts of technical obstructionism.

Our attention has been called to the fact that in the *Drake Bakeries* case, supra, 370 U. S. 254, the District Court, not the arbitrator, decided the question whether the Union had proceeded with dispatch in seeking arbitration and the Supreme Court approved the ruling (p. 266). But apparently the issue of whether the Court or an arbitrator should have decided that question was not raised by the parties, as the opinion does not refer to such an issue being in the case, which we believe undoubtedly would have been done if the Court intended to make a ruling on the issue.

Under the foregoing status of the authorities we have concluded to follow the ruling and reasoning of the Second Circuit in its recent ruling in the *David Livingston* case, supra, and to hold that the question of whether there has

been sufficient compliance with preliminary steps in grievance procedure is a matter for the arbitrator rather than the court.

With this contention of the employer removed from the case, it follows that the judgment of the District Court is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 23, 1963.)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge.

ORDER DENYING REHEARING.

(Filed March 19, 1963.)

Appellant's petition for rehearing having been considered by the Court,

IT IS ORDERED that said petition be denied.

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge.

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS IN COMPANION CASE No. 14,839.

No. 14839

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEFFERSON CITY CABINET CO.,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO and MACHINE WORKERS, AFL-CIO, and LOCAL UNION 748 of INTERNATIONAL UNION of ELECTRICAL, RADIO and MACHINE WORKERS, AFL-CIO,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided February 4, 196

Before: MCALLISTER and MILLER, Circuit Judges, and BOYD, District Judge.

MILLER, Circuit Judge. The plaintiff-appellant, Jefferson City Cabinet Co., filed this action under Section 301 of the Labor Management Relations Act, Section 185, Title 29, United States Code, against the defendants-appellees, an international union and a local labor organization, seeking damages in the amount of $579,300.00 by reason of a violation of the no-strike clause of their collective bargaining contract with the plaintiff. The defendants filed a motion to dismiss the complaint for lack of jurisdiction for the reason that the collective bargaining

agreement required plaintiff's complaint to be submitted to arbitration. This motion was later amended so as to seek in the alternative a stay of the proceedings until the arbitration proceedings had been completed, in accordance with the procedure required by the contract. Thereafter, the plaintiff filed a motion for summary judgment supported by affidavits giving the facts leading up to the strike. The defendants in turn filed affidavits in opposition to the motion for summary judgment, supplying additional facts. The factual situation is thus fully presented and does not appear to be in dispute.

The District Judge denied the plaintiff's motion for summary judgment and granted the defendants' motion to dismiss, from which ruling this appeal was taken by the plaintiff.

The facts giving rise to the controversy are as follows.

On February 7, 1961, Clara Cameron, a Chief Steward in the Electronics Division of the plaintiff, who had been absent on authorized sick leave, returned to work and was told there was no work for her that day, but there would be work for her on the following day. At 10 A. M. on the same day the President of the Local inquired as to the Company's position on Clara Cameron. He was told she would have worked the next day, to which he replied that if she were not put to work immediately he had been instructed by the International Representative "to pull the plant out." There was some further discussion and difference as to whether a seven-day waiting period, provided in the contract, applied to sick leave as well as to personal leave. The upshot of the dispute was that approximately 200 employees walked out of the plant on the afternoon of February 7, 1961. Pickets were established and the plant shut down completely on the following day.

The affidavits filed by the defendants stated that the incident concerning Clara Cameron had no great significance except that it was the culminating incident or grievance of a hundred or so which had been filed with the Company and upon which, because of delays and other obstructions by the Company, no decision could be reached. Efforts had been made by officers of the Local to break the log jam and restore grievance procedure and job classifications without avail. It was asserted that, as a result of these tactics of the Company, the grievance procedure set up in the contract had completely broken down and when the Cameron incident arose the Executive Committee voted to strike.

Thus, there is no denial by the parties that there was a strike, which was in violation of the no-strike provision of the bargaining agreement. The issue presented is, Can an action to recover damages for this breach of the bargaining agreement be maintained in the District Court or is it a matter which is required by the bargaining agreement to be submitted to arbitration?

It is settled law that a party cannot be required to submit to arbitration any dispute he has not agreed to so submit and that it is for the parties to agree upon which matters or disputes are to be subject to arbitration and which are not to be subject to arbitration. The arbitration provision can be broad or restricted in accordance with the agreement of the parties. In case of disagreement over whether a particular issue between the parties is an arbitrable one under the contract, the Court will construe the contract and determine that question. If it concludes that the issue is an arbitrable one under the agreement of the parties, the Court will require the parties to arbitrate. *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564; *United Steelworkers v. Warrior & Gulf Naviga-*

tion Co., 363 U. S. 574, 582. If it concludes that the issue is not an arbitrable one under the agreement of the parties, arbitration will not be required and the aggrieved party can attempt to enforce his claim in an appropriate judicial proceeding. *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238. It is purely a question of contract construction. Accordingly, in the present case it is for the Court to determine, as a matter of law, whether, under the provisions of the bargaining agreement between the parties, the present claim of the Company for damages for breach of the no-strike provision of the Agreement is or is not an arbitrable one.

Articles VII and VIII of the bargaining agreement in the present case provide the controlling provisions in the disposition of this case.

Article VII is entitled "Grievance Procedure." Paragraph 1 thereof provides as follows:

> "1. To adequately provide for the settlement of disputes arising out of the administration of this contract a grievance procedure is hereby provided. Formal grievances must be presented through Union representation as provided in the Grievance Procedure. This does not restrict employees from discussing day to day problems with their foreman or supervisor. Should grievances arise, there shall be no suspension or interruption of work on account of such grievances and a diligent effort shall be made to settle all grievances as soon as possible after they have been presented."

Paragraph 2 provides for the first four steps of the Grievance Procedure,—Step 1 being a discussion between the affected employee and the foreman; Step 2 being the presentation of the written grievance to the department foreman; Step 3 being the presentment of the grievance to the Division Superintendent; and Step 4 being the pre-

sentment of the grievance to the Plant Manager. Paragraph 5 provides "Any disputes not settled under the above procedure may then be appealed to the Arbitration Procedure as provided in Article VIII of this Agreement."

Paragraph 8 of Article VII provides:

> "The Union agrees that there will not be any strike, slow down, work stoppage, or any other form of action which results in delay, stoppage of work or production during the term of this Agreement. The Company agrees that there will be no lockout during the term of this Agreement."

Paragraph 10 of Article VII provides:

> "Any grievance filed by the Company against the Union shall be presented at the fourth step of the Grievance Procedure."

Article VIII is entitled "Arbitration." Paragraph 1 thereof provides as follows:

> "1. A claim that the Company or the Union has violated some provision of this contract or failed to perform some obligation assumed under this contract is an arbitrable grievance within the meaning of this contract. Such grievances which are not disposed of in Step 4 of the grievance procedure as provided in Article VII of this contract shall be submitted to final and binding arbitration under the provisions and procedures of this Article. Claims other than those defined above shall not be deemed arbitrable under this contract."

Before considering the no-strike and arbitration provisions in the present bargaining agreement, we will refer to three cases heretofore decided by this Court, upon which the plaintiff chiefly relies. In each of those cases it was held that the breach of a no-strike clause in the bargaining agreement was not an arbitrable issue. *Hoover Motor Ex-*

press Co. v. Teamsters, Chauffeurs, etc., 217 F. (2) 49, C. A. 6th; *International Union, etc. v. Benton Harbor Malleable Industries*, 242 F. (2) 536, C. A. 6th, cert. denied, 355 U. S. 814; *Vulcan-Cincinnati, Inc. United Steelworkers, etc.*, 289 F. (2) 103, C. A. 6th. However, it is the contention of the defendants that those cases are not decisive of the present case in that they were decided under the provisions of particular collective bargaining agreements there involved, which were limited in scope and were materially different from the broad provisions in the present case.

We agree with the ruling of the District Judge for the reasons stated by him that this point is well taken. In each of those cases, the bargaining agreement there involved, under which arbitration was asked by the union and denied by the employer, set up a grievance procedure for the settlement of grievances, under which arbitration was eventually required if the grievance was not satisfactorily disposed of in other negotiations. The Court held in each case that a breach of the no-strike provision of the bargaining agreement was not a "grievance" within the scope of the grievance procedure, and, accordingly, the provision for arbitration of an unsettled grievance was not applicable. In the *Benton Harbor* and *Vulcan-Cincinnati* cases express reference is made to the fact that the grievance procedure dealt only with grievances of the employee against the employer and made no provision for the settlement of a claim or grievance on the part of the employer against the union as was there involved. See 242 F. (2) at page 541 and 289 F. (2) at page 106. The Supreme Court has recently indicated that the correctness of those decisions is dependent upon the narrowly drawn provisions of the arbitration clauses therein involved. *Atkinson v. Sinclair Refining Co., supra*; 370 U. S. 238, note 3 on page 242;

Drake Bakeries v. Local 50, American Bakery . . . Workers, 370 U. S. 254, 264, and note 13 on that page. See also: *Yale & Towne Mfg. Co. v. Local Lodge, etc.*, 299 F. (2) 882, 885, C. A. 3rd. As will be seen from the following discussion of the question, the arbitration provision in the present case is a much broader one and is not limited to "grievances."

In the *Benton Harbor* case and the *Vulcan-Cincinnati* case we also took the position that the no-strike clause was an independent, unequivocal, unconditional obligation on the part of the union; that arbitration of any "difference" or "grievance" that might arise was to be used instead of a strike; that there was no right to strike under any conditions; and, accordingly, the right to strike was not an arbitrable issue under the contract. This interpretation of the bargaining agreement is what has been referred to by the Supreme Court in later cases as the "quid pro quo" theory in a bargaining agreement, namely, that the unconditional no-strike obligation on the part of the union is the consideration given to the employer in exchange for his promise to arbitrate disputes or grievances. Being such, it is not subject to any exceptions, it is not arbitrable. See: *United Steelworkers v. American Manufacturing Co.*, *supra*, 363 U. S. 564, 567; *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 455. In the *Textile Workers* case, *supra*, the Supreme Court in sustaining the enforcement of an arbitration agreement by suit under Section 301 of the Labor Management Relations Act, quoted from Senate Report No. 105, 80th Congress, 1st Session, pages 16-18, to the effect that the chief advantage which an employer could reasonably expect from a collective labor agreement was assurance of uninterrupted operation during the term of the agreement, and that without some effective method of assuring freedom from economic warfare for the term

of the agreement, there was little reason why an employer should desire to sign such a contract. It then said: "Plainly, the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. . . . It expresses a federal policy that *federal courts should enforce these agreements* on behalf of or against labor organizations and that industrial peace can be best obtained *only* in that way." (Emphasis added.) 353 U. S. pages 453-455.

This construction of the contract was in accord with a number of authorities from other circuits which were referred to in the opinion in those cases. Although there were authorities to the contrary (see *Yale & Towne Mfg. Co. v. Local Lodge, etc., supra*, 299 F. (2) 882, C. A. 3rd, where the conflict in the authorities is recognized and discussed, particularly in view of the Supreme Court ruling in *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U. S. 574, and its two companion cases) we were of the opinion that the "quid pro quo" theory was the proper analysis of the problem and carried out the intention of the parties. See dissenting opinion in the *Yale & Towne Mfg. Co.* case, 299 F. (2) at page 885.

If that ruling was still in force and effect in this circuit, we would agree with appellant's contention that it was decisive of the issue in this case and require a reversal of the judgment. But we believe that that analysis and solution of the problem has been recently rejected by the Supreme Court in *Drake Bakeries v. Local 50, American Bakery . . . Workers, supra*, 370 U. S. 254, 260-264, note 7 on page 261, affirming the judgment of the Court of Appeals, reported at *Drake Bakeries v. Local 50, American Bakery . . . Workers*, 294 F. (2) 399, C. A. 2nd. The District Judge in making his ruling in this case relied in part upon the ruling of the Court of Appeals in that case before its affirmance by the Supreme Court. We believe

that the District Judge correctly held, in view of the ruling in the *Drake Bakeries* case and the limited scope of the arbitration provisions in the *Benton Harbor* and *Vulcan-Cincinnati* cases, that it was not the law that the question of liability for violation of a no-strike provision could not be submitted to arbitration, but that it was a question whether under the provisions of the bargaining agreement in question such an issue was an arbitrable one.

Turning now to a construction of the no-strike and arbitration provisions of the bargaining agreement before us, it is, of course, clear that under paragraphs 1 and 8 of Article VII the Union agreed not to strike during the term of the agreement and that should a grievance arise, there would be no suspension or interruption of work and that a diligent effort would be made to settle all "grievances" as soon as possible. Other paragraphs of Article VII provide the way in which grievances were to be settled, including eventual arbitration if not successful otherwise. Under paragraph 10 of Article VII a grievance by the Company was included in this grievance procedure. The Union failed to comply with its obligation not to strike. For the purposes of this opinion it is not for us to decide whether, in view of the Union's contention that the grievance procedure had completely broken down by reason of plaintiff's failure to process grievances, the plaintiff has an enforceable claim for damages. It is sufficient to recognize that undoubtedly it has a claim. As hereinabove pointed out, the question for this Court to decide at the present time is whether this claim is an arbitrable one under the provisions of the bargaining agreement or if it is a claim which is not arbitrable and can, accordingly, be litigated in this judicial proceeding.

It is true that the grievance procedure set up by Article VII refers to the settlement of "grievances" by

negotiation and arbitration if ultimately necessary. If that was all which was before us for consideration, we might well follow our previous ruling to the effect that the breach of a no-strike obligation is not a "grievance." But Article VI also refers specifically to arbitration of unsettled "disputes" in accordance with the provisions of Article VIII. Unquestionably, there is an unsettled "dispute" between the parties. The present action filed in the District Court is proof of that. *United Steelworkers v. American Manufacturing Co., supra,* 363 U. S. 564, 569. But, irrespective of that, Article VIII defines not only the way in which arbitration is to proceed but also states that certain claims constitute "grievances" which are subject to arbitration. This is the crucial provision in our consideration of this question. It provides in paragraph 1, "*A claim* that the Company or *the Union has violated some provision of this contract* or failed to perform some obligation assumed under this contract *is an arbitrable grievance* within the meaning of this contract." (Emphasis added.)

As said in the *Drake Bakeries* case, 370 U. S. at pages 257-258 with respect to a similar arbitration provision, this is broad language, indeed, which is not restricted to disputes involving questions of interpretation or application of any clause or matter covered by the contract, but includes the arbitration of "all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party, or any relation between the parties, directly or indirectly." The Court said in that case that if the no-strike provision of the contract was so fundamental and so basic to the company as not to be subject to arbitration it was reasonable to expect that it would have been expressly excluded from the comprehensive language of the arbitration provision, if the parties so intended. Such also is the teaching of *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U. S. 574, 582-585.

We have considered other contentions of the appellant, which we find to be without merit.

We are of the opinion that under the authority of the *Drake Bakeries* case, *supra*, and the *Warrior & Gulf Navigation Co.* case, *supra*, the judgment should be affirmed.

It is so ordered.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

JEFFERSON CITY CABINET CO., *Petitioner*,

v.

LOCAL UNION 748 OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1962

No. 1,004

JEFFERSON CITY CABINET CO., *Petitioner,*

v.

LOCAL UNION 748 OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinions and orders of the District Court are unreported and are printed in the Record at pp. 53a, 68a, and 71a. The opinion of the Court of Appeals for the Sixth Circuit is reported at 314 F.2d 192 (Petition, Appendix, 9-16).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. In an action to compel arbitration of employee discharges, are procedural objections to arbitration to be referred to the arbitrator or resolved by the courts when the agreement provides for arbitration of questions of its interpretation and application?

2. Pursuant to an agreement which provides for arbitration of grievances claiming that discharges are not for just cause, are grievances over the discharge of employees for allegedly striking in violation of the no-strike, no-lockout provisions of the agreement subject to arbitration?

Statute Involved

Section 301(a) of the Labor Management Relations Act, 1947, 290 U.S.C. § 185(a) is the pertinent statutory provision. It appears in the Petition at page 2.

Statement

Petitioner entered into a collective bargaining agreement with Respondent on September 12, 1958, effective until May 1, 1961, (14a). Pursuant to this agreement, grievances involving claimed violations of the agreement or failure to perform obligations assumed thereunder, including claims of discharge without just cause, were subject to arbitration (14a, 20a, 28a).

On February 7, 1961, approximately 200 employees walked out of Petitioner's plant and on the following day the strike became plant-wide. Thereafter on various dates, defendant discharged employees who did not return to work (66a-67a). A grievance was subsequently filed protesting the discharges which was not satisfied. A demand for arbitration was made by Respondent with which Peti-

tioner refused to comply (10a-12a). As a consequence this action was commenced.

Disputing Petitioner's assertion that the strike was caused by a single dispute or grievance, Respondent filed affidavits to show that a large backlog of grievances filed by a large number of employees existed at the time of the walkout and strike and that these grievances had accumulated over a period of months prior to February 7, 1961. Due to the dilatoriness of Petitioner, contrary to its obligation under Article VII, Section 1 of the agreement, the grievance procedure had broken down and had become ineffective, causing considerable unrest and tension among Petitioner's employees. Petitioner's demonstrated unwillingness to process grievances with defendants resulted in the events of February 7, 1961. (44a-53a). Respondent contended that under the circumstances the discharges of its employees were not for just cause.

The District Court granted Respondent's motion for summary judgment, finding that the discharge grievances were clearly referable to arbitration under the terms of the collective bargaining agreement. (68a, 71a). The Court of Appeals affirmed, rejecting Petitioner's defenses that Respondent had repudiated arbitration and that it had lost the right to arbitration because it had not satisfied procedural requisites to arbitration. As to the latter, the Court found the issue raised by Petitioner was one properly to be determined in the arbitration proceeding sought by Respondent.

ARGUMENT

I. There Is No Conflict of Decisions Which Warrants Grant of the Petition

Both the *Brass & Copper Workers* and the *Boston Mutual Life Insurance Co.* decisions,[1] on which Petitioner relies as creating a conflict with the decision of the court below, were decided prior to June 20, 1960, when this Court announced its opinions in the three *Steelworkers* cases.[2] Those opinions set forth the principles and guidelines to be followed in developing the body of federal law governing the enforcement of collective bargaining agreements.[3] Since the *Steelworkers* decision, the court below and the three other circuit courts which have faced the first question in this case have been in agreement, and no circuit court has decided it to the contrary.[4]

The dates of the two contrary decisions are more than coincidental, for decisions since the *Steelworkers* cases have drawn substantially from them and rest solidly upon the principles enunciated in them.[5]

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[1] *Brass & Copper Workers* v. *American Brass Co.*, 272 F. 2d 849, (C.A. 7, 1959); *Boston Mutual Life Insurance Co.* v. *Insurance Agents International Union*, 258 F 2d 516 (C.A. 1, 1958).

[2] *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[3] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448; *Dowd Box Co.* v. *Courtney*, 368 U.S. 502.

[4] *Livingston* v. *John Wiley & Sons*, 313 F. 2d. 52, (C.A. 2) decided Jan. 11, 1963, petition for certiorari filed March 15, 1963, No. 934, this Term; *Deaton Truck Line* v. *Local 612, etc.*, 314 F. 2d 418, (C.A. 5), decided Nov. 16, 1962, and modified March 14, 1963; *Radio Corporation of America* v. *Association of Professional Engineering Personnel*, 291 F. 2d 105 (C.A. 3), decided May 25, 1961; *International Tel. & Tel. Corp.* v. *Local 400, International Union of Electrical Workers*, 286 F. 2d 329 (C.A. 3), decided December 20, 1960.

[5] *Livingston* v. *John Wiley & Sons*, 313 F. 2d 52, at 61-63, (C.A. 2); *International Tel. & Tel. Corp.* v. *Local 400, International Union of Electrical Workers*, 286 F. 2d 329, at 331-332, (C.A. 3); *Deaton Truck Line* v. *Local 612, etc.*, 314 F. 2d 418, at 422 (C.A. 5).

Thus, until such time as a circuit court reaches a contrary view notwithstanding the *Steelworkers* principles, there is not such a conflict in decisions as warrants the grant of the petition.

Additional reasons exist why the Petition in this case should be denied. As the court below indicated, other reasons were advanced by Respondent why the procedural issue should have been resolved in its favor. The court found support for one of Respondent's contentions and expressed no opinion as to others (Petition pp. 13-14). Thus, there are alternative grounds of decision which would make it possible to dispose of this case without reaching the question presented in the Petition.

Finally, on the question presented, the reasoning set forth in this decision, as well as in the recent decisions of the other circuits in agreement with it and in the discussions of commentators on this issue,[6] leaves little doubt that the court below correctly decided the question.[7] Indeed, Petitioner has not argued to the contrary in its Petition.[8]

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[6] Cox, *Reflections Upon Labor Arbitration*, 72 Harvard Law Review 1482, 1510-1512; Gregory, *The Law of the Collective Agreement*, 57 Michigan Law Review 635, 647-650; *Procedural Requirements of a Grievance Arbitration Clause, Another Question of Arbitrability*, 70 Yale Law Journal 611.

[7] Resolution of the procedural question of timeliness raises a number of questions as to the intent of the parties in establishing the time limits, as to their application in present circumstances, the effect of the fact that the employees did not have normal access to the plant, whether the agreement requires that the first four steps be followed prior to arbitration in all circumstances, and whether the grievances presented a continuing violation within the meaning of the agreement. These issues go to the heart of the system of industrial self-government, and are typical of the issues which parties refer to arbitration in expectation that an arbitrator will bring considerations to bear which are foreign to the competence of the court and are unexpressed in the agreement. See *United Steelworkers v. Warrior & Gulf Navigation Co., supra* and *Cox, Reflections Upon Labor Arbitration*, 72 Harvard Law Review 1482, 1498-1499, quoted therein.

[8] In this connection, it is to be noted that although Petitioner seeks certiorari as to this issue, in its petition for rehearing filed in the court

Under all the circumstances, denial of certiorari in this case would be consistent with the controlling principles in this field.

II. There Is No Inconsistency Between the Decision Below and the Decisions of This Court

Petitioner's argument that the decision below is inconsistent with the decision in the *Drake Bakeries* case,[9] is the same as the argument made in its Petition in the companion case No. 1003 and, in fact, is based on the decision of the Court in that case (Petition, page 7).[10] The answer is accordingly also the same.

The Court below in the companion case agreed with the District Judge that in view of this Court's decision in the *Drake Bakeries* case:

> "[I]t was not the law that the question of liability for violation of a no-strike provision could not be submitted to arbitration, but that *it was a question whether under the provisions of the bargaining agreement in question such an issue was an arbitrable one.*" (Petition, Appendix, p. 25, emphasis added).

Petitioner nonetheless asserts that the court below thereby "interpreted and applied *Drake* as requiring a holding that the no-strike clause and grievance provisions are not mutually dependent covenants" and that the Court misinterpreted and misapplied Drake, "By failing to consider the no-strike provisions in their context." (Petition p. 7).

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below, it did not seek reconsideration of this aspect of the decision below, despite the fact that the *Wiley* and *Deaton* cases were decided after the briefs were filed, and were raised by Respondent for the first time in oral argument.

[9] *Drake Bakeries* v. *Local 50, American Bakery Workers*, 370 U.S. 254

[10] *Jefferson City Cabinet Co.* v. *International Union of Electrical Workers, et al.*, 313 F. 2d 231 (C.A. 6).

It is apparent that Petitioner has misinterpreted the decision of the Court below, and that the Court below faithfully construed and followed the principles of *Drake*.

III. There Is No Other Question of Importance In This Case

Petitioner contends that this Petition raises important questions not decided in the *Drake Bakeries* case, *supra*. This contention is identical to its contention in the Petition in the companion case. As in that case, the question raised is a mere question of contract interpretation and of fact.

In the *Drake Bakeries* case, *supra*, this Court set forth the guiding principles to be followed by the lower courts in determining whether claims of breach of no-strike provisions are arbitrable and whether or not the promise to arbitrate has been so repudiated by one party as to excuse the other party from performance. This case does not involve a claim of breach of a no-strike clause. It involves the arbitration of discharges clearly provided for by contract. Petitioner does not claim that any further principle remains to be established in this case. Instead, Petitioner asserts that there are "questions of the fact and effect of such repudiation" presented in this case (Petition, p. 5). There would be no question as to the effect of repudiation if such had been found, but it was not. The Court below considered and rejected the contention of repudiation in its initial decisions in this case and its companion case and in rejecting petitions for rehearing in both cases.[1]

Petitioner attempts to imbue with some magical significance the fact that the no-strike, no-lockout obligation is referred to twice in the agreement in this case rather than once as in *Drake*. But this fact does not alter

[1] The Court below noted, among other things, that the Petitioner's conduct was inconsistent with its claim of repudiation (Petition, Appendix, p. 12).

the applicable principles. In each case it was necessary to determine the meaning of the obligation and not its form. This was faced and decided by the Court below, and no reason has been advanced why this Court should now be required to consider this question of contract interpretation.

The issue raised by Petitioner is narrow and has no impact beyond this case.[12] As this Court has made abundantly clear, the public interest lies in having agreements to arbitrate disputes arising under collective bargaining agreements enforced, regardless of the nature of the dispute. *Drake Bakeries v. American Bakery Workers*, 370 U.S. 254, 263-264.[13] The only question in this case relates to "the particular decision reached in [an] individual controversy" which, Petitioner appears to concede, does not justify the grant of its Petition. (Petition, p. 6).

[12] Despite Petitioner's assertion, Respondent does not recognize the contract provisions involved as typical provisions.

[13] See *United Steelworkers v. Warrior and Gulf Co., supra; United*

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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